No. 78-877

In the Supreme Court of the United States

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JOHN L. CONNOLLY, ET AL., PETITIONERS

v.

PENSION BENEFIT GUARANTY CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

HENRY ROSE
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

E. CALVIN GOLUMBIC
Assistant General Counsel
Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 581 F. 2d 729. The opinion of the district court (Pet. App. 14c-25c) is reported at 419 F. Supp. 737.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1978. A petition for rehearing was denied on September 8, 1978 (Pet. App. 13b). The petition for a writ of certiorari was filed on December 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Operating Engineers Pension Trust is a "defined benefit plan" covered by the pension plan termination insurance program of the Employee Retirement Income Security Act of 1974.

STATEMENT

Petitioners are the trustees of the Operating Engineers Pension Trust (Pension Trust), a joint labor-management trust established under Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), to administer the Operating Engineers Pension Plan (Plan) (R. 30). Seven trustees are appointed by associations of employers in the construction industry and seven are appointed by Local Union No. 12 of the International Union of Operating Engineers (Union) (R. 48).

Employers contributing to the Pension Trust periodically enter into collective bargaining agreements with the Union. Those agreements provide, *inter alia*, that the employers will contribute to the Pension Trust an amount calculated by multiplying the number of hours each employee works by a specified hourly rate (R. 30-31).

The Plan provides that, on retirement, a participant is entitled to a monthly pension benefit calculated by multiplying the number of years worked by a "pension factor," expressed as a dollar amount (R. 34-39). Under the terms of the Plan, the trustees periodically revise the pension factor based on an actual evaluation of various circumstances that affect the financial soundness of the Pension Trust, such as investment performance and employee turnover and mortality (R. 41).

Respondent is a government corporation established under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301 *et seq.*, to administer a program of pension plan termination insurance. Respondent guarantees payment of pension benefits in "defined benefit" pension plans that terminate with insufficient funds to pay the guaranteed benefits. 29 U.S.C. 1321 and 1322. A defined benefit plan is "a pension plan other than an individual account plan * * *." 29 U.S.C. 1002(35). An "individual account plan"

(also known as a "defined contribution plan") is a pension plan that "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account * * *." 29 U.S.C. 1002(34). Respondent does not insure "individual account" plans. 29 U.S.C. 1321. Respondent's insurance program is financed primarily by the payment of insurances premiums by covered plans. For multi-employer plans such as the Plan here, the annual premium is 50 cents for each participant in the plan. 29 U.S.C. 1306(a)(3)(B).

On December 1, 1974, petitioners paid to respondent a termination insurance premium of $12,043 (Pet. App. 1a).[1] On April 10, 1975, they applied to respondent for a determination that the Plan was a defined contribution plan and thus exempt from the termination insurance program (Pet. App. 1a-2a). Respondent informed petitioners that the Plan was a defined benefit plan subject to the termination insurance program and denied petitioners' request for a refund of the premium (Pet. App. 2a).

Petitioners then brought this suit in the United States District Court for the Central District of California, seeking a declaratory judgment that the Plan was a defined contribution plan. On cross-motions for summary judgment based on stipulated facts, the district court granted petitioners' motion and ordered respondent to refund the premiums paid. The district court held that the Plan was not a defined benefit plan, reasoning (Pet. App. 22c):

> In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather, it is clear that he only

[1] Petitioners do not contend that this amount was improperly determined if they are subject to the termination insurance program.

> promises that he will pay into the fund each pay period the contribution that is prescribed by the trustees and that his obligation to the fund is then ended.

The court of appeals reversed. It concluded (Pet. App. 7a):

> The statutory definition of an individual account or defined contribution plan [in 29 U.S.C. 1002(34)] contains two requirements. The first requirement is that a plan must provide for an individual account for each participant. The second requirement is that a participant's benefit must be based solely on the amount in his account. Neither of these requirements is satisfied by the Plan.

The court of appeals also reasoned that there is "no possibility" that a defined contribution plan could terminate while underfunded, because the employee's accrued benefit "is simply 'the balance of the individual's account.' 29 U.S.C. 1002(23)(b). Thus by definition, an individual account plan can never be underfunded," and there is no reason to subject it to a termination insurance program. Pet. App. 8a-9a. The Pension Trust, on the other hand, "provides for benefits for service prior to the inception of the plan, and the Plan is presently underfunded because *inter alia* of these promised benefits" (*id.* at 9a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with the decisions of this Court or any other court, and there is no reason to grant review of the first appellate decision to consider the matter.

1. The parties stipulated in the district court that (R. 40-41):

> A computer print-out of the information maintained on behalf of each participant shows the number of hours worked each month by an individual, the obligated monthly contribution to be made on behalf of an individual and the monthly accrual of an individual's Pension Credits. * * * It is not possible to determine the amount actually contributed on behalf of an individual participant from the computer print-out of the information maintained for each participant. No other information for the purpose of determining the amount of the pension benefit payable to an individual participant except for identifying information is maintained on an individual participant * * *.
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> * * * *
>
> At no time either on the Work Sheet or on the Pension Application form is the amount actually contributed on behalf of a participant determined. A participant's benefit is paid regardless of whether the obligated contributions on his behalf are actually made, provided there are sufficient assets in the Fund.

The court of appeals was therefore correct in determining that the Plan has neither of the two attributes of a defined contribution plan within the meaning of 29 U.S.C. 1002(34): "an individual account for each participant and * * * benefits based solely upon the amount contributed to the participant's account * * *." See Pet. App. 7a. This makes the Plan a defined benefit plan because, under 29 U.S.C. 1002(35), any plan that is not an individual account plan is a defined benefit plan. And all defined benefit plans are subject to the termination insurance program by virtue of 29 U.S.C. 1321(a) and (b)(1).

2. Petitioners to the contrary (Pet. 6), the decision below does not conflict with *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977). *Alabama Power* held that, under Section 9 of the Military Selective Service Act, 38 U.S.C. 2021, which guarantees veterans returning from military service the right to be restored to their former employment "without loss of seniority," a veteran is entitled to credit his time in the military as time on the job for purposes of determining his pension benefits. The Court's opinion mentions in passing that Alabama Power Company's pension plan is a defined benefit plan, rather than a defined contribution plan, because "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 593 n.18.

Petitioners appear to argue (Pet. 6 and n.2) that, because the collective bargaining agreement between the employers and the Union promises a certain contribution to the trust fund for each employee and does not promise a certain benefit, then the Plan is not a defined benefit plan within the language from *Alabama Power*. This contention is incorrect. *Alabama Power*'s language simply does not support petitioner's apparent belief that a defined contribution plan is one in which the employer has promised a fixed contribution while a defined benefit plan is one in which he has promised a fixed benefit. The question is not what the employer has promised to pay to the fund but what the fund is obliged to pay to the participants. If the benefits are "based solely upon the amount contributed to the participant's account" (and each participant has an individual account) then the plan is a defined contribution plan; otherwise it is a defined benefit plan. 29 U.S.C. 1002(34), (35).[2] As this Court

[2]Petitioners likewise can find no support for their position in the legislative history of ERISA (Pet. 15-17). The "fine print" (Pet. 17) of the statutory definition of a defined contribution plan is not at all ambiguous, contrary to petitioners' assertion, so reference to the legislative history is unnecessary. There is no more merit to petitioner's discussion (Pet. 17-18) of administrative pronouncements regarding a particular type of defined contribution plan that is not involved in this case.

stated recently in describing a plan that, like this one, required the employer to contribute a fixed amount per employee man-week:

> Because the Fund made the same payments to each employee who qualified for a pension and retired at the same age, rather than establishing an individual account for each employee tied to the amount of employer contributions attributable to his period of service, the plan provided a "defined benefit." See 29 U.S.C. §1002(35); *Alabama Power Co.* v. *Davis*, *supra*, at 593 n.18.

International Brotherhood of Teamsters v. *Daniel*, No. 77-753 (Jan. 16, 1979), slip op. 2 n.3.

3. There is no merit to petitioners' contention (Pet. 9) that the court of appeals' decision deems the trustees to be the employers' representatives or agents and thus abrogrates the trustees' fiduciary obligations to the plan participants. To a certain extent, the corpus of the trust fund in any pension plan will reflect the trustees' investment decisions; if the trustees invest wisely, the corpus will grow and the employers may succeed, in future bargaining agreements, in reducing their contributions. Conversely, unwise investment decisions by the trustees may well result in union demands for increased employer contributions in the future. But the natural tension between what the employees want and what the employers are willing to provide has always been the stuff of collective bargaining, and this is as true of contributions to pension plans as it is of wages or other working conditions. See *Inland Steel Co.* v. *National*

Labor Relations Board, 170 F. 2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949). Trustees of a pension fund do not bargain with the employees and do not "promise" pension benefits as agents of the employer (Pet. 9). The obligation that ERISA imposes on defined benefit plans to pay premiums for termination insurance does not impinge on the trustees' fiduciary obligations or make them representatives or bargaining agents of the employer.[3]

4. Finally, petitioners contend that there will be a "mass exodus of employers from participation in multi-employer pension trusts" (Pet. 8) because of the liability that, the court of appeals held, ERISA imposes on those plans. But the court of appeals did no more than apply the law passed by Congress. If this will visit adverse economic effects on pension trust funds subject to the termination insurance program, petitioners' recourse is to Congress, not to this Court.

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[3]In *Sheet Metal Workers' International Association*, 234 N.L.R.B. No. 162 (1978) and *United Mine Workers of America, Local 1854 (Amax Coal Co.)*, 238 N.L.R.B. No. 214 (1978), on which petitioners rely (Pet. 10-12), the National Labor Relations Board held that the trustees of a jointly administered multi-employer trust fund are solely fiduciaries, not collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B). The decision of the court of appeals does not convert the trustees into bargaining agents or abridge the right to strike recognized by *Sheet Metal Workers* and *Amax Coal Co., supra*. Petitioners' implication (Pet. 13-14) that the NLRB has imposed on the trustees an obligation to act both as fiduciaries and as Section 8(b)(1)B) representatives is erroneous; *Sheet Metal Workers* and *Amax Coal Co.* recognized the conflict that such a dual role would create and held that trustees are *not* Section 8(b)(1)(B) representatives.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

HENRY ROSE
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

E. CALVIN GOLUMBIC
Assistant General Counsel
Pension Benefit Guaranty Corporation

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